

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ALLSTATE INSURANCE COMPANY,
ALLSTATE PROPERTY & CASUALTY
INSURANCE COMPANY, ALLSTATE
INDEMNITY COMPANY, and
ALLSTATE
FIRE & CASUALTY INSURANCE
COMPANY,

Plaintiffs,

v.

TACOMA THERAPY, INC., TACOMA
REHABILITATION THERAPY, INC.,
P.S., ANDREW JACOBS, MELANIE
JACOBS, NANDY, INC., NATHAN
LEMINGS AND JANE DOE LEMINGS,
husband and wife, and the marital property
thereof, THE LAW OFFICE OF
MCLAUGHLIN &
ASSOCIATES, INC., WESLEY
MCLAUGHLIN AND JANE DOE
MCLAUGHLIN, husband and wife, and the
marital property thereof, DIRECT
SOLUTIONS MARKETING, INC., DOES
1-100 and ROES 101-200,

Defendants.

Case No. 3:18-mc-05022-RBL-TLF

**PLAINTIFFS' RESPONSE TO
PLATINUM'S FRCP 72(A)
OBJECTIONS**

Noting Date: April 17, 2019

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1 Plaintiffs Allstate Insurance Company, Allstate Property & Casualty Insurance
2 Company, Allstate Indemnity Company, and Allstate Fire & Casualty Insurance Company
3 (Plaintiffs) request that the Court reject Platinum Collision Center, LLC, and Tausha
4 McKernan's FRCP 72(a) Objections to Magistrate Fricke's April 1, 2019 Order.

5 II. ARGUMENT

6 A. Platinum and Ms. McKernan waived their Rule 72(a) objections by not timely raising
7 them with Magistrate Judge Fricke.

8 A litigant waives Rule 72(a) objections by not timely raising the issues to the magistrate
9 judge. *Greenhow v. Secretary of Health & Human Servs.*, 863 F.2d 633, 638-39 (9th Cir. 1998)
10 ("allowing the parties to litigate fully their case before the magistrate and, if unsuccessful, to
11 change their strategy and preset a different theory to the district court would frustrate the
12 purpose of the Magistrate Act") (*overruled on other grounds by United States v. Hardesty*, 977
13 F.2d 1347, 1348 (9th Cir. 1992) (en banc) (per curiam)); *Keen v. Noble*, 2007 U.S. Dist. LEXIS
14 69629 (E.D. Cal.) ("new evidence and arguments should not be raised in objections to Findings
and Recommendations"); *Gwin v. Martel*, No. CV 14-6083-MWF (GJS), 2017 U.S. Dist.
LEXIS 17966, at *2 (C.D. Cal. Feb. 6, 2017) (applying same rule to Rule 72(b)).

15 When a motion is referred to a magistrate judge, "a party must raise before the
16 magistrate judge all pertinent issues generated by motion and make known to magistrate judge
17 all of its arguments, contentions, and statements of position on which it relies to achieve
18 favorable decision." *Thorndike v. DaimlerChrysler Corp.*, 288 F Supp 2d 50, 53 (D. Me. 2003).
19 "A party is not entitled to a *de novo* review by a district judge of argument never seasonably
raised before magistrate judge." *Id.* at 53.

20 Platinum and Ms. McKernan waived their Rule 72(a) objections by failing to raise them
21 with Magistrate Fricke. Their current objections are nothing more than an attempt to improperly
22 relitigate issues *de novo* that were not seasonably raised before Magistrate Fricke. To rule
23 otherwise would be patently unfair to Plaintiffs. Moreover, this is not the purpose of Rule 72.
24 Plaintiffs have acted in good faith to resolve any legitimate discovery issues at every step of the
25 way, including by participating in a discovery conference with Platinum's then-counsel Mr.
Kesling,¹ filing a motion to compel when Platinum's responses were insufficient, and engaging

26
27 ¹ There is absolutely no evidence before this Court by Mr. Kesling or anyone else that Plaintiffs' counsel Mr. Melter misrepresented the terms of that discovery conference.

1 in additional discussions and meetings with Platinum's new counsel. Platinum is clearly capable
2 of obtaining counsel and representing its own interests, and it could have done so here. There
3 is no basis to allow Platinum to assert objections and arguments it should have raised in
4 response to Plaintiffs' motion to compel. It is not Plaintiffs' fault that Platinum fired Mr.
5 Kesling and brought in its current counsel while a motion was pending against it. Nor is it
justification to set aside Magistrate Fricke's Order.

6 B. Platinum have failed to show the Magistrate's Order is clearly erroneous or contrary to
7 law.

8 Under Rule 72(a), upon review of objections to a magistrate judge nondispositive order,
9 "the district judge must consider **timely objections** and modify or set aside any part of the order
10 that is **clearly erroneous or is contrary to law.**" (emphasis added). The magistrate judge's
11 resolution is entitled to substantial deference and may not be disturbed by a district court absent
12 a finding that the determination was clearly erroneous or contrary to law. Fed. R. Civ. P. 72(a);
see also Wolpin v. Philip Morris Inc., 189 F.R.D. 418, 422 (C.D. Cal. 1999).

13 Discovery orders are generally subject to the "clearly erroneous" standard. *SEC v. Banc*
14 *de Binary Ltd.*, No. 2:13-cv-00993-RCJ-VCF, 2014 U.S. Dist. LEXIS 174871, at *3 (D. Nev.
15 Dec. 16, 2014) ("It was not clear error for the Magistrate Judge to find that further discovery
16 would help prove [defendants acted in concert]"). Thus, "[w]here a magistrate is designated to
17 hear a discovery motion, '[a] judge of the court may reconsider any pretrial matter'" if "'it has
18 been shown that the magistrate's order is clearly erroneous or contrary to law.'" *Rockwell*
19 *Intern., Inc. v. Pos-A-Traction Industries, Inc.*, 712 F.2d 1324, 1325 (9th Cir. 1983) (quoting
20 28 U.S.C. § 636(b)(1)(A)).

21 In this case, Platinum and Ms. McKernan have failed to establish that Magistrate
22 Fricke's Order is clearly erroneous or contrary to law. Despite their objections being fourteen
23 pages in length, Platinum and Ms. McKernan hardly mention this legal standard, likely because
they cannot meet it. *But see* Dkt. # 23 at 7 (arguing this Court should grant *sua sponte* relief).
As noted below, the objections that Platinum and Ms. McKernan do raise are meritless.

24 1. Platinum's objections to Plaintiffs' document subpoena are unsupported by law
25 or fact.

26 **Time limitations.** Platinum incorrectly and disingenuously argues the document
27 subpoena obligates it to produce "seemingly" "every email and text message ever exchanged

1 between cousins Andrew Jacobs and Tausha McKernan.” Dkt. # 23 at 2. Platinum ignores the
2 discovery conference between Platinum’s then-counsel Peter Kesling and Plaintiffs’ counsel
3 Mark Melter on February 19, 2019, in which Mr. Melter agreed to limit the subject matters on
4 which Plaintiffs were requesting communications. Dkt. # 11-11. Platinum fails to explain why
5 additional time limitations are necessary for it to respond to those discrete categories.
6 Furthermore, Platinum ignores that Mr. Melter specifically invited Platinum’s counsel to raise
7 any time limitation concerns that he believed were necessary, but he never did. Dkt. # 26 at ¶9.

8 **Definition of YOU.** Platinum objects to the definition of “YOU.” Again, neither Mr.
9 Kesling nor Mr. Morgan raised this issue before filing the instant objections. That aside,
10 Platinum ignores that Plaintiffs submitted the document subpoena as written to this Court in
11 November when it initially sought postjudgment discovery. Dkt. # 2-5. Plaintiffs have not
12 changed a word of the subpoena, including the definition of “YOU,” following this Court’s
13 Orders authorizing the subpoena. Dkts. ## 3, 5. As a result, the suggestion that the subpoena is
14 outside the scope of Magistrate Fricke’s January 10, 2019 Order is unsound.

15 **Overly Burdensome.** Platinum next asserts that the document subpoena is overly
16 burdensome and would require “hundreds of hours of work.” But Platinum has not provided
17 any evidence to support this contention, such as how many responsive documents are in its
18 possession and how long it would take to produce them. This is despite Plaintiffs’ counsel
19 repeatedly asking Platinum for information regarding what it has done to date and how much
20 longer it expects production to take. *E.g.*, Dkt. # 26 at ¶¶11-16.

21 Notably, when Platinum provided Plaintiffs’ counsel actual evidence that one of its
22 requests was especially burdensome—*i.e.*, that there were 1,000-1,200 responsive work orders
23 containing powers of attorney that needed to be collected and scanned into electronic format—
24 Plaintiffs agreed to delay production of those documents in exchange for the production of three
25 specific work orders. If Platinum could produce actual facts, rather than hyperbole, about the
26 burdensomeness of Plaintiffs’ other requests, Plaintiffs might consider additional limitations.
27 However, Platinum refuses to provide this information. Dkt. # 26 at ¶¶12-16; Dkt. # 26-2.

The District Judge should also take note that Platinum is now contending it would be
overly burdensome to produce all the checks signed by Mr. Jacobs, Dkt. # 23 at 2, whereas
before Mr. Kesling told Plaintiffs’ counsel “[t]here are no checks” signed or endorsed by Mr.
Jacobs. Dkt. # 11-14 (Resp. to Doc. Req. 3); Dkt. 11-9 (Pls’. Doc. Req. No. 3). It is difficult for

1 Plaintiffs to understand how they can accused of “wild-west and factually unsupported
2 discovery tactics,” Dkt. # 23 at 14, when Platinum cannot provide consistent answers regarding
3 whether Mr. Jacobs has signed or endorsed any checks.

4 Platinum also suggests, without citation to authority, that Plaintiffs should not be
5 allowed to burden Platinum without first attempting to garnish Mr. Jacobs’ wages. Respectfully,
6 the manner in which Plaintiffs seek to satisfy their \$750,000 judgment is not for Platinum to
7 decide, nor does it make Plaintiffs’ requests any more or less reasonable. Platinum’s obligation
8 was to show that Magistrate Fricke’s order was clearly erroneous. It has failed.

9 **Phone Records.** Platinum also that Plaintiffs are asking Platinum to obtain the phone
10 records of its employees, agents, consultants, representatives, etc. Plaintiffs are **not**, however,
11 seeking any phone records beyond Platinum’s possession, custody, or control. If Platinum
12 sought to raise this issue with Plaintiffs’ counsel before filing the instant motion, it would know
13 that.

14 **Confidential information regarding finances.** Platinum also argues that Magistrate
15 Fricke’s Order would force it to disclose “sensitive and confidential information to Platinum’s
16 disadvantage.” Dkt. # 23 at 3. Plaintiffs are genuinely confused as to what information Platinum
17 is concerned about or how Plaintiffs might use that information against it. This much is clear,
18 however: Plaintiffs are focused on satisfying the judgment against Mr. Jacobs and have no
19 desire to put Platinum at a competitive disadvantage. Platinum’s conjecture is not helpful.

20 **No meaningful production to date.** Plaintiffs would be remiss if they did not point out
21 that Platinum has, even as of today, failed to make any meaningful production of responsive
22 documents, such as communications with Mr. Jacobs, pay stubs of Mr. Jacobs, Mr. Jacobs’
23 employment file, or other nonprivileged documents that are clearly discoverable.

24 **Summary.** Platinum has failed to identify any clearly erroneous finding or ruling
25 contrary to law in Magistrate Fricke’s Order. Where Platinum has provided Plaintiffs a
26 legitimate objection to the document subpoena, Plaintiffs have agreed to limit their discovery.²
27 There is no reason to set aside Magistrate Judge’s Order and allow Platinum to move for a
protective order.³

² Dkt. # 26-2 at ¶12 (stating that Plaintiffs told Platinum’s counsel they were not interested in the work product documents he described).

³ Uncoincidentally, Plaintiffs suggested a protective order during their discovery conference
PLAINTIFFS’ RESPONSE TO PLATINUM’S
FRCP 72(A) OBJECTIONS - 5

1 2. Ms. McKernan has not identified any legitimate basis to object to her
2 examination.

3 Ms. McKernan also objects to Magistrate Fricke's Order directing her to appear for an
4 examination. She argues Plaintiffs never issued a subpoena for her examination, thereby
5 depriving the Court of jurisdiction over her and leaving her without ability to respond. Of
6 course, Plaintiffs did not issue a subpoena to Ms. McKernan because Magistrate Fricke's Order
7 did not require them to issue a subpoena. Still, Ms. McKernan cites to no authority for the
8 proposition that a district court cannot, through a magistrate's order only, direct a person within
9 its jurisdiction to appear for an examination. To the extent this is an issue, it is easily remedied
by allowing Plaintiffs to simply serve a subpoena on Ms. McKernan.

10 Ms. McKernan's objections also baselessly call into question whether she was served
11 by Plaintiffs with the Magistrate's Order. *See* Dkt. # 23 at 13 ("There is no indication in the
12 Court's file as to whether Platinum or Ms. McKernan was ever served with the April 1, 2019
13 Order or the method of service.") Respectfully, this is gamesmanship. Ms. McKernan and her
14 counsel know she was served with the April 1, 2019 Order, and it is inappropriate to suggest
15 otherwise. Dkt. # 33. It is especially untoward following Ms. McKernan's prior claim that she
16 was not served by Plaintiffs' Motion to Compel. *See* Dkt. # 16 (Pls.' Surreply addressing prior
17 claims of no service); Dkt. # 12 (affidavit of service stating individual at Platinum put papers
18 outside office following service).

19 Finally, Ms. McKernan's claim that she had no opportunity to respond to Plaintiffs'
20 request is belied by the fact that she did, in fact, respond. Dkt. # 15. She has done nothing to
21 demonstrate that Magistrate Fricke's Order was clearly erroneous or contrary to law.

22 C. Platinum and Ms. McKernan's additional argument is unpersuasive and does not negate
23 the evidence already before this Court.

24 Platinum appears to believe that it has "completely wiped out" Plaintiffs' theory of a
25 fraudulent transfer or alter ego relationship, but this is absolutely false. While Plaintiffs have
26 explained why there may be power of attorney documents, they have not explained why a
marketing and sales manager, who was purportedly an independent contractor, is endorsing
checks on behalf of Platinum when it previously represented that he was not a signatory on its

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with Platinum, but Platinum refused this invitation. Dkt. # 11-11.

1 bank account.

2 Furthermore, it is undisputed that Plaintiffs have produced uncontroverted testimony
3 that Mr. Jacobs is representing himself to the public as the owner of Platinum, Dkt. # 11 at
4 ¶¶27-28; that, despite being the sole owner of Platinum, Ms. McKernan has not filed any taxes
5 pertaining to Platinum for years 2016, 2017, or 2018, Dkt. # 11-13 at 7; that one of Platinum's
6 business formation documents contains a signature purportedly belonging to Ms. McKernan
7 that is likely forged, Dkt. # 11-20 at 3; that Ms. McKernan appears to have represented to the
8 public that she is not the owner of Platinum, Dkt. # 11 at ¶29; that Ms. McKernan did not
9 publicly disclose her ownership in Platinum until after Plaintiffs served their initial
10 postjudgment discovery in this matter, Dkt. # 11 at ¶25; and that one of the features of the
underlying RICO fraud perpetuated by Mr. Jacobs involved creating a shell company to funnel
money from business in which he held a silent ownership interest, Dkt. # 11 at ¶5-6.

11 Based on the information above, including the questions that still surround Mr. Jacobs'
12 role and participation in Platinum, Platinum and Ms. McKernan have failed to show that any
13 part of Magistrate Fricke's Order of April 1, 2019 was clearly erroneous or contrary to law. The
14 Court should affirm the Magistrate's Order and reject Platinum's and Ms. McKernan's
15 objections.

16 II. CONCLUSION

17 Platinum and Ms. McKernan failed to properly raise their objections before the
18 Magistrate Judge. Accordingly, their objections are waived. To the extent the Court considers
19 them, they are meritless and insufficient to demonstrate that the Magistrate Judge's Order was
clearly erroneous or contrary to law.

20 DATED THIS 16TH DAY OF APRIL, 2019.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the 16th day of April, 2019, I electronically filed
3 **PLAINTIFFS' RESPONSE TO PLATINUM'S FRCP 72(A) OBJECTIONS** with the
4 Clerk of the Court using the CM/ECF system and notification of such filing was sent to
5 the following as indicated below:

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20 Signed at Seattle, Washington this 16th day of April, 2019.

21 /s/Donna Steinmetz

22 Donna Steinmetz, *Legal Assistant*